Supreme Court of the United States

OCTOBER TERM 1946

No. 1403 99

ARMAND ROBICHAUD,

Petitioner,

v.

DANIEL J. BRENNAN, Judge of Essex County Court of Common Pleas, State of New Jersey, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY, AND BRIEF IN SUPPORT THEREOF

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Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Armand Robichaud, of Glen Ridge, Essex County, New Jersey, respectfully presents this petition for a writ of certiorari to review the final decision of the Court of Errors and Appeals of the State of New Jersey, rendered and filed April 24, 1947, which affirms the judgment of the New Jersey Supreme Court entered October 28, 1946, upholding dismissal of writ of habeas corpus issued by Daniel J. Brennan, Judge of Essex County Common Pleas Court, and remanding petitioner to the custody of the Sheriff of Essex County for extradition to the State of Michigan.

Summary and Short Statement of the Matter Involved

On June 5, 1944, the Governor of Michigan issued a requisition upon the Governor of New Jersey requiring the petitioner to be apprehended and delivered to the properly designated Michigan authorities.

On August 29, 1944, the Governor of New Jersey issued a warrant of rendition, as a result of which the prisoner was apprehended and taken into custody.

Thereafter, a Judge of the Essex County Court of Common Pleas granted petitioner's prayer for relief by issuing a writ of habeas corpus in the usual form, whereby the validity and legality of the petitioner's detention were raised.

Following hearing on the writ before the Judge of the Essex County Common Pleas, the writ of habeas corpus was discharged. Order carrying that conclusion into effect will be found in the record at page 163.

Opinion of the Judge of the Pleas will be found at page 140 of the record.

Upon the entry of the order by the Judge of the Pleas a writ of certiorari was allowed by New Jersey Supreme Court to review its validity.

Having found the said order valid the writ was dismissed. The opinion of the New Jersey Supreme Court will be found at page 203 of the record.

The decision of the New Jersey Court of Errors and Appeals, rendered and filed as stated on April 24, 1947, affirms the judgment of the New Jersey Supreme Court and the opinion of that court.

It is this last mentioned decision of the New Jersey Court of Errors and Appeals affirming the judgment of the New Jersey Supreme Court from which your petitioner seeks review.

Jurisdictional Statement

The jurisdiction of this court is invoked under U. S. Code, Title 28, Section 344(b) (Judicial Code, Section 237 amended).

Questions Presented

1. Did the "warrant" authenticated by the Governor of Michigan as the basis of the demand for Petitioner's custody (being the only document certified as authentic) comply with the requirements of 18 U. S. C. A., Section 662, that an authenticated indictment, or an affidavit, be produced before the chief executive of the asylum state?

2. Was the constitutional guaranty that Petitioner should not be deprived of his liberty without due process of law violated by the action of the courts of the State of New Jersey in dismissing writ of habeas corpus granted to Petitioner and remanding him to the custody of the Sheriff of Essex County, New Jersey?

Reasons Relied on for the Allowance of the Writ

1. The authorities of the demanding state failed to comply with the Act of Congress (18 U. S. C. A., Sec. 662, *et seq.*) requiring production before chief executive authority of the asylum state of a copy of an indictment found, or an affidavit made, before a magistrate of the demanding state, charging the person demanded with having committed a crime, certified as authentic by the Governor of the demanding state.

2. Proceedings taken in the state of New Jersey failed to comply with the extradition statutes, both of New Jersey and Michigan, which two states have adopted the Uniform Extradition Act in substantially the same form, in that

(a) Warrant for arrest of petitioner was the only document certified by the Governor of the demanding state as authentic;

(b) All of the miscellaneous documents which were attached to the warrant (but which were not authenticated by the Governor of the demanding state) came into existence upon various dates after the issuance of the warrant ranging in time from 29 days to 31 days thereafter;

(c) Hence, at the time of the issuance of the warrant there was not even in existence an affidavit made before a magistrate of the demanding state charging petitioner with the commission of a crime.

3. The decision of the New Jersey Court of Errors and Appeals is a mere *pro forma* affirmance adopting the opinion of the New Jersey Supreme Court, which will be found at page 203 of the record. Such decision is in complete disregard, not only of the requirement of the Act of Congress referred to, but as well to the requirements of the Uniform Extradition Act as adopted by both the states of Michigan and New Jersey.

4. The proceedings taken in and by the said courts of the State of New Jersey deprives Petitioner of his liberty without due process of law contrary to the provisions of the constitution of the United States.

WHEREFORE, your petitioner respectfully prays that writ of certiorari issue to the New Jersey Court of Errors and Appeals, and submits his brief in support of his petition.

Dated: May 23, 1947.

Respectfully submitted,

THOMAS MCNULTY,
Counsel for Petitioner.

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Reference is made to the foregoing petition for a summary statement of the matter involved and a jurisdictional statement.

The opinion of the New Jersey Supreme Court is reported in 134 N. J. L. 532; 49 Atl. (2d) 287, and is printed in the record at page 203.

The opinion of the New Jersey Court of Errors and Appeals is not yet reported in the state reporting system. It is a formal adoption of the opinion of the New Jersey Supreme Court, and is printed in the record at page 217.

Facts

On June 5, 1944, the Governor of Michigan issued a requisition upon the Governor of New Jersey requiring

the appellant to be apprehended and delivered to the properly designated Michigan authorities.

Attached to the requisition is a series of papers.

"Application for Requisition" addressed to the Governor of Michigan, by Victor C. Anderson, prosecuting attorney of Ingham County, undated; record, page 18.

Warrant issued May 2, 1944, by Leland W. Carr stated to be "Circuit Judge acting under Sections 17217 and 17218 Compiled Laws of Michigan for 1929 and Acts Amendatory thereto" found at page 34 of the record;

Authentication of warrant signed by the Governor of Michigan, and dated June 5, 1944, found at page 17 of the record.*

Affidavit of Charles F. Hemans dated June 1, 1944, page 21 of the record.

Certificate of Leland W. Carr, Circuit Judge, dated June 2, 1944, page 32 of the record.

Examination of and testimony by the witness Hemans taken before Judge Carr May 31, 1944.

Affidavit of Victor Anderson, prosecuting attorney of Ingham County, dated June 2, 1944.

All of such four documents, or exhibits, are antedated by the warrant by various periods ranging from twenty-nine days to thirty-one days.

Therefore, at the time of the issuance of the warrant there was no affidavit in existence so far as the requisition upon the Governor of New Jersey discloses, upon which the warrant for the apprehension and rendition of the appellant was issued.

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* It will be observed that the authentication is limited to the *warrant* just previously referred to. No other document forming part of the requisition is authenticated by the Governor of Michigan.

On August 29, 1944, the Governor of New Jersey issued a warrant of rendition, as a result of which the prisoner was apprehended and taken into custody.

Thereafter, a Judge of the Essex County Court of Common Pleas granted appellant's prayer for relief by issuing a writ of habeas corpus in the usual form, whereby the validity and legality of the appellant's detention were raised.

Following hearing on the writ before the Judge of the Essex County Common Pleas, the writ of habeas corpus was discharged. Order carrying that conclusion into effect will be found in the record at page 163.

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Upon the entry of the order by the Judge of the Pleas a writ of certiorari was allowed by the Court below to review its validity.

Having found the said order valid, the writ was dismissed. The opinion of the New Jersey Supreme Court will be found at page 203 of the record.

On appeal to the New Jersey Court of Errors and Appeals that Court affirmed the Court below by adopting its opinion.

POINT I

Failure to Comply with Federal Statute.

It cannot be gainsaid that the appellant, by the recitals contained in warrant (Record, p. 34) is suspected of participating in the commission of a serious offense—bribing of members of the legislature of the state of Michigan; however, the appellant is a resident of the State of New Jersey, and has been such for the past 10 years. It is

his right to remain in his domicil unmolested and free from attempted interference with his liberty, unless the essential elements and requirements of the extradition statutes are strictly followed.

The subject of interstate rendition has its origin in the Constitution of the United States.

Article 4, Section 2, Clause 2, of the United States Constitution provides:

> "A person charged in any State with treason, felony, or other crime who shall flee from justice and be found in another state, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

Because of an opinion rendered by Attorney General Randolph that the foregoing article of the Constitution was not self-executing, chiefly because it provided no machinery for its execution, the Congress in 1793 legislated on the subject. Such legislation may now be found in 18 U. S. C. A. §§ 662 *et seq.*

Section 662 of such Title provides as follows:

> "§ 662. FUGITIVES FROM STATE OR TERRITORY. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person had fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or

> to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory. (R. S. § 5278.)"

See *Ex parte Kentucky* v. *Dennison*, 24 How. 66, 104; 16 L. Ed. 17, 728; also *Hyatt* v. *New York, ex rel. Corkran*, 188 U. S. 691.

There is a uniformity of decision by the courts of the United States that there shall be a formal accusation under oath of a crime having been committed in the demanding state. In *Roberts* v. *Reilly*, 116 U. S. 80, 6 S. Ct. 291, 299; 29 L. Ed. 544, the court lays down the general qualifications which must be met before extradition can be permitted. In the words of the court:

> "The act of congress (section 5178, Rev. St.) makes it the duty of the executive authority of the state to which said person has fled to cause the arrest of the alleged fugitive from justice, whenever the executive authority of any state demands such person as a fugitive from justice, and produces a copy of an indictment found, or an affidavit made, before a magistrate of any state, charging the person demanded with having committed a crime therein, certified as authentic by the governor or chief magistrate of the state from whence the person so charged has fled. It must appear, therefore, to the governor of the state to whom such a demand is presented, before he can lawfully comply with it—*First*, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the state making the demand; and *second*, that the person demanded is a fugitive from justice of the state the executive authority of which makes the demand."

See also:

In re Strauss (1905), 197 U. S. 324, 25 S. Ct. 535, 49 L. Ed. 774;
Pierce v. *Creecy* (1908), 210 U. S. 387, 28 S. Ct. 714, 52 L. Ed. 1113;
Compton v. *Alabama* (1909), 214 U. S. 1, 29 S. Ct. 605, 53 L. Ed. 885.

In two later day lower court decisions, *Ex parte Nash* (1930), 44 F. (2d) 403, and *United States* v. *Meyering* (1934), 75 F. (2d) 716, 718, the views of this court are reiterated and would seem to be the law of today.

It is interesting to note that in the *Meyering* case the Circuit Court of Appeals for the 7th Circuit, in discharging the prisoner detained for extradition upon a murder charge, held that the Federal Statute makes no provision for the certification of a *warrant*. The court said:

> "The certification of the warrant is not a sufficient compliance with the statute (citing cases) * * * *The statute is one involving the substantial rights of citizens and its essential elements must be strictly followed (citing cases). Only by faithfully following the provisions of the statute may a person be lawfully deprived of his liberty and extradited from an asylum state to another state, there to be tried for the commission of a crime. The alleged fugitive has a right not to be imprisoned or dealt with by states in disregard of those safeguards provided by the constitution of the United States.*" (Italics ours.)

POINT II

Failure to comply with extradition statutes of New Jersey and Michigan.

The Uniform Extradition Act has been adopted by both states in substantially the same form. In both of them, to have a valid demand for extradition, the demand, which is required to be in writing, must be accompanied by

(1) A copy of the indictment found or by information supported by affidavit in the state having jurisdiction of the crime; or

(2) A copy of any affidavit made before a Magistrate there, together with a copy of any warrant which was issued thereupon.*

The indictment, information or affidavit must *substantially charge the person demanded with having committed a crime under the law of that State.*

The copy of the *indictment, information* or *affidavit* must be authenticated by the executive authority making the demand.

The Court below disposed of the matter by affirming the finding of the Judge of the Common Pleas, viz., the warrant took the place of an indictment, predicating its conclusion upon the fact that under the Code of Criminal Procedure of Michigan (3 Comp. Laws 1929 para. 17118; Stat. Ann. para. 28.843) the word "indictment" includes the words "information," "presentment," "complaint" and "warrant" and any other form of written accusation, citing following cases in support of its position *In re Watson*, 291 N. W. 652; *In re Petition for Investigation of*

* The warrant which is annexed to the requisition papers delivered to the Governor of New Jersey could not possibly have been issued on any of the affidavits annexed, as such warrant on its face shows it was issued long prior to the dates of the affidavits.

Recount, 258 N. W. 776; *People* v. *St. John*, 278 N. W. 754; *People* v. *Ewald*, 4 N. W. (2d) 456.

The Court below then proceeds to say:

> "The learned judge of the court below in passing upon this question held:
>
> '1. That it charges a crime against the petitioner and others in the manner provided by the laws of the demanding state;
>
> '2. That the charge is made by a duly constituted grand jury under the statute law of Michigan;
>
> '3. That such warrant as is now before the court is a sufficient instrument on which the petitioner could be apprehended and held for trial in the demanding state.'
>
> With these conclusions we agree. The warrant is, in effect, an indictment within the meaning of the extradition statute, is in compliance therewith and alleges an offense against the laws of the State of Michigan. The authorities in this State will not pass upon the validity of a complaint filed in another jurisdiction. In the matter of Peter Voorhees, 32 N. J. L. 141; In re Williams, 101 N. J. Eq. 75."

That the conclusions reached by the Court below and by the Judge of the Essex Common Pleas are erroneous is established by the following:

(a)

The warrant plainly does not contain the necessary substantive elements of an indictment, most striking of which is the fact that a common law grand jury makes a formal charge of crime under oath.

An indictment is a written accusation against one or more persons of a crime or misdemeanor presented to or preferred *upon oath or affirmation* by a grand jury legally

convoked, Bouvier's Law Dictionary; 4 Blackstone's Commentary 299; Coke's Littleton 126; 2 Hale P. L. Cr. 152.

The instant warrant is not made under oath. Indeed, it is no more than an elaborate apprehension process. Examination of it (Record, p. 34) discloses that only in respect of the length and details of recitals does it vary from the common form of warrant issued to apprehend accused persons.

Whether the demand be in the form of an indictment or affidavit as required by the Federal Statute or information as added by the state statutes, the demand must substantially *charge* the person demanded with having committed a crime under the law of the demanding state. See R. S. 2:185-11.

Similar requirement exists in the Uniform Extradition Law as adopted by New Jersey and Michigan and also in the Federal Statute, Title 18, U. S. C. A., Section 662. However, in the instance of the Federal Statute the word "substantially" appears to have been omitted.

What do we find upon examination of the warrant under consideration here? It contains no more than the statement of a suspicion, viz.,

> *"There appears to me (Judge Carr) to be probable cause to suspect"* (italics ours)

that the named persons did commit the crime of conspiring to bribe members of the legislature of the State of Michigan, and therefore the Sheriff of Ingham County is directed to arrest the named defendants and bring them before Judge Carr to be dealt with according to law.

As we hereafter point out "to be dealt with according to law" means to have an examination in order to make it possible of determination by the Prosecutor of the County whether he should file an information against the defendants as a substitute for an indictment.

Contract the language of the warrant with that of a common law indictment as returned by the grand juries of New Jersey. (See Appendix 1.)

The New Jersey indictment *affirmatively charges* as a fact that the named defendant did commit the crime designated in the indictment. So far as the form of the two instruments is concerned, doubt and uncertainty no stronger than a suspicion characterize the warrant, whereas in the case of the common law indictment there is a definite affirmative charge against the defendant of the commission of a crime. While, of course, as the Court below said, "The authorities in this state will not pass upon the validity of a complaint filed in another jurisdiction" that is quite beside the question here, which is—Does this instrument satisfy the requirement of the Federal Statute and of the Uniform Extradition Act of both states, that the defendant, who is demanded, be CHARGED with the commission of a crime? We think not.

(b)

The Statutes of Michigan

Appended hereto are the pertinent sections of the Michigan Code of Criminal Procedure as found in the Annotated Statutes of Michigan which describe the procedure to be followed *as upon formal complaint* by the justice or judge, with whom complaint has been filed as a result of which he undertook an investigation. (See Appendix 2.)

We are particularly concerned with:

Section 17218 under which a warrant, such as we have in this case, is authorized to be issued;

Section 17196 providing for examination of the apprehended person;

Section 17205 requiring the magistrate before whom the apprehended person is arraigned under warrant so issued to be bound over to appear before the Circuit Court of such county, or any court having jurisdiction, for trial; and

Sections 17255 and 17256 requiring the prosecutor to file an information against the apprehended and accused person but which information may not be filed until after the accused has had a preliminary examination (unless waived). *A highly important portion of the section last referred to is that which provides that informations may be filed without such preliminary examination against fugitives from justice and any such fugitives against whom an information may be filed may be demanded in the same manner and the same proceedings may be had thereon as provided by law in like cases of demand upon indictment found.* (Italics ours.)

Those sections of the Michigan Statutes show that the procedure which, under the Code of Criminal Procedure, *must* be followed in Michigan, after a person has been arrested under a warrant issued by a so-called "one-man grand jury" to cause the apprehension of persons suspected of commission of crime, is as follows:

1. After his arrest the defendant must be brought before the Court.
2. The Court then sits as an examining magistrate; and
3. If the offense is bailable, the Court must admit him to bail.
4. Unless such examination is waived by the defendant, a date must be set for a public hearing, at which the people's witnesses must be examined in open court, and the defendant afforded a right of cross examination.

5. If it appears to the magistrate, after examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed, and that there is probable cause for charging the defendant therewith, the magistrate must bind such defendant to appear before the Circuit Court for trial.

6. The magistrate must then certify and return all examinations and recognizance taken by him to the Clerk of the Circuit Court.

7. After such certificate and return is filed, the prosecuting attorney of the county must examine all the facts and circumstances connected with such preliminary examination, and if he is satisfied a crime has been committed, he, as informant, must sign and file an information.

8. If the prosecuting attorney determines that an information ought not to be filed, he is required to file a written statement to that effect together with his reasons for not filing it.

9. If the Court is not satisfied with such statement, he may direct the prosecuting attorney to file the proper information bringing the case to trial.

10. No information may be filed against any person charging crime, until after such person shall have had a preliminary examination before a magistrate, unless such examination be waived, except, however, *information may be filed without such examination against a fugitive from justice.*

11. Upon the filing of such information, the defendant is arraigned thereon, and required to plead thereto.

12. It is upon the information so filed that a person is brought to trial.

How can it be claimed that the instant warrant is "in effect an indictment within the meaning of the extradition statute (and) is in compliance therewith" in the face of the Michigan statute (Section 17256) specially providing in the case of "*fugitives from justice for the filing of an information without preliminary examination, and the bringing of extradition proceedings thereon in the same manner * * * as provided by law in like cases of demand upon indictment filed?*"

The foregoing provision is a clear recognition of the requirement of the Uniform Extradition Act, before the return of the fugitive may be demanded of the asylum state, an information must be filed or an indictment found. It is a complete answer to the view adopted by the Court below that "the grand jury warrant took the place of an indictment which, under the Code of Criminal Procedure, 3 Comp. Laws 1929, para. 17118 (stat. and para. 28.843) includes the words 'information, presentment, complaint, warrant, and any other formal written accusation.'" "Indictment" may include "warrant" by force of the statute; however, "warrant" does not include "indictment."

Under Michigan law a person can only be brought to trial either on an indictment found by a grand jury of not less than sixteen *or on an information filed by the prosecuting attorney of the county.*

(c)

Procedure of the Michigan Court in the Instant Case

Reference is made to Exhibit P-3 of September 21, 1944 (at the Habeas Corpus hearing), to be found on page 164 of the Record. It consists of two documents:

(1) A warrant issued by Judge CARR of the Circuit Court of Ingham County, Michigan, dated May 2, 1944; and

(2) Certificate by the same Judge of the proceedings had before him on the return of said warrant and which certificate is dated June 1, 1944.

The warrant forming part of the exhibit is identical with the warrant authenticated by the Governor of Michigan and forming the basis of the extradition proceedings.

It appears that a Judge of the Circuit Court for the County of Ingham, Michigan, conducted an inquiry under Sections 17217 and 17218 of the Michigan Compiled Laws (1929) in a proceeding entitled "In the Matter of the Complaint of Herbert J. Rushton, Attorney General for the State of Michigan, for a Judicial Investigation concerning certain Criminal Offenses."

In accordance with the Michigan procedure the Judge heard the testimony of witnesses and issued a warrant for the apprehension of fourteen named defendants, one of whom is the appellant. Approximately a month later the prosecutor obtained an affidavit from one Charles F. Hemans. This affidavit, along with the prosecutor's application for requisition, the warrant and its authentication, the examination of Hemans subsequent to the issuing of the warrant and its authentication and the affidavit of the prosecutor were sent to the Governor of Michigan. These papers, as well as the Governor's demand on the Governor of New Jersey, for the surrender of appellant, constitute the documents on which the extradition is sought.

The likelihood is that duplicate warrants were issued containing the names of all of the defendants. Possibly as many duplicate originals were made as there were defendants named in the warrant. However that may be, reference to the second of the two documents forming Exhibit P-3, being certificate of Judge Carr, shows (p. 173) that the accused persons were duly arrested by virtue of such war-

rant* and brought before him, whereupon the charge was read to the accused persons who did demand an examination and which examination after adjournment was had. Judge CARR then proceeds to certify (see p. 174) "that from the evidence offered and received on said examination it was made to appear to me, the said Circuit Judge, that said offense as set forth in the warrant was committed as charged therein, and that there was probable cause to believe that said accused persons to have been guilty thereof, whereupon I, the said Circuit Judge, acting as Magistrate as aforesaid, did order that said defendants, and each of them, *be bound over to the Circuit Court in and for the County of Ingham for trial and further proceedings in said cause * * * to answer to such information as might be filed against said defendants, or any of them for said offense* * * *. (Italics ours.)

Were the warrant, as the New Jersey Supreme Court found, "in effect an indictment within the meaning of the extradition statute (and) is in compliance therewith, what possible reason could there have been for the defendants, who were found in Michigan, to have been bound over to answer such information as might be filed against them. The procedure which was adopted and followed in respect of the thirteen companion defendants of the appellant unquestionably was in pursuance of, and under the statutory provisions to which reference has heretofore been made. They were bound over to answer such information because Sections 17205, 17255 and 17256 require that an examination be held as a condition precedent to the filing of an information except in the case of fugitives from justice, and that after the examination shall have been held, the accused, there being probable cause therefor, shall be bound over to appear before the Circuit Court to await the filing of information upon which he may be brought to trial.

* It is obvious that this statement is erroneous. The appellant was not found in Michigan and hence the extradition proceeding. There was an evident failure to exclude the appellant by name from the implication that all of the accused persons were duly arrested.

(d)

Undenied Testimony of Members of Michigan Bar

Upon the application for the writ to the New Jersey Supreme Court it was suggested that perhaps it might be well to take testimony of members of the Michigan Bar upon this particular point.

Thereafter a rule was obtained from the Chief Justice which required that more than the usual four days' notice be given of the intention to take proof; in fact, ten days' notice was given so that the authorities of Michigan might have ample time to be notified and arrange to appear. No one did appear at the taking of the testimony.

The petitioner called two of the outstanding members of the Michigan Bar, Glenn C. Gillespie of Pontiac, and David H. Crowley of Detroit. Both of the witnesses have been identified with the enforcement of the criminal law of that State.

Judge Gillespie functioned as Assistant Prosecutor and as Prosecutor of Oakland County for eight years in all. Following a short service as City Attorney of Pontiac, he was appointed Circuit Court Judge of the Sixth Judicial Circuit of Michigan. He served in that capacity for fifteen years, voluntarily retiring to resume the practice of law. The Circuit Court is the same court of which Judge CARR, who issued the warrant under attack, is a member—their jurisdiction having been in different counties.

Judge Gillespie was one of a committee charged by the Supreme Court of Michigan to formulate rules and regulations for the organization of the State Bar; he was one of the first Board of Commissioners of the State Bar, and Secretary of the organization, later becoming President.

As a member of the Michigan Judges' Association he collaborated in the preparation of the Michigan Code of Criminal Procedure, and also the Penal Code. His services were enlisted in the drafting of the so-called One-Man Grand Jury Statute, under which the present proceedings, now reviewed, were taken. He is also the author of a standard work on Michigan Criminal Law and Procedure, published by the Lawyers Co-operative Publishing Company of Rochester, and which work has been in general use in Michigan since its publication in 1940.

He had a great many occasions while Prosecutor to take proceedings under the Uniform Extradition Act; later when occupying the Bench frequently heard petitions for habeas corpus to test out the sufficiency of various papers used in connection with extradition, and after his retirement from the Bench for some time was legal Adviser to one of Michigan's Governors on applications for extradition from the State of Michigan.

Mr. Crowley served as Prosecuting Attorney for one of Michigan's counties for four years; following that he served as Assistant Attorney General of Michigan for four years. Then he returned to private practice. In October of 1935 he became Attorney General of that State, holding office until 1937. For a number of years he was a Regent of the University of Michigan. He has been engaged in the general practice of law in that State since 1905.

In the interest of brevity and to prevent burdening the record, only one of these gentlemen was examined in detail. Judge Gillespie covered the ground completely. While he was testifying Mr. Crowley sat in his presence and listened to his testimony. He corroborated Judge Gillespie's testimony.

In effect, Judge Gillespie testified as follows:

The only possible crime that could be charged by the warrant in question would be the offense of conspiracy as

it was known at the common law. The punishment prescribed for such offense is imprisonment for not more than five years, or a fine of not more than $2,000. That crime which calls for such punishment, is designated in the Michigan law as a felony, triable only in the Circuit Court of the county—or where some of the cities, such as Detroit, have a specially constituted court the offense would be triable in the Recorder's Court.

The steps necessary to be taken before the accused could be brought to trial are:

Under a warrant such as appears in the record in this case if the offender had been taken into custody he would be brought before the Judge who issued the warrant and would be entitled to a preliminary examination before the Judge unless such examination was waived. The purpose of that examination would be to determine, first, whether or not the offense had been committed and, secondly, whether or not there was probable cause to believe that the defendant had committed the offense. If the Judge so determined the offender would be bound over to the Circuit Court for trial.

Before the defendant could be put upon trial the prosecuting attorney of the county would have to file an information, which is a formal charge under oath setting forth the offense for which the accused is to be tried. Prior to the trial the prosecuting attorney is required to endorse on the information the names of all witnesses who are to be called at the trial, and none other may be called except the Court, in its discretion, might permit a late endorsement for good cause.

Having examined the particular warrant issued in this case Judge Gillespie testified that if the persons named in the warrant as being suspected of having committed a crime were apprehended and arraigned they would be bound over to wait the action of the Circuit Court of Ingham

County. If a trial were to be had it would only be as a result of an information under oath filed, as stated, by the prosecuting attorney of that county.

There was read to the witness the statement made by Mr. Sigler, which appears in the record at page 133. His answer was that it would be impossible under the Michigan law to place the respondents named in the warrant on trial in Michigan on that instrument. He said the prosecuting attorney would be obliged to conduct a preliminary examination before Judge CARR, or some other qualified Magistrate, and the Judge would have to make a finding that the offense had been committed, and that there was probable cause to believe that the defendants committed it. Then the Prosecutor would be obliged to file an information in the Circuit Court. Defendants would be tried on the information and not upon the warrant. Moreover, under the practice prevailing the defendant is called upon to plead only to the information. He is not required to plead to the warrant.

He characterized the warrant in this case as nothing more than process calling for the apprehension of the appellant, Robichaud, and the other defendants named therein.

Having had called to his attention Exhibit P-3, of September 21, 1944, being warrant issued for the apprehension of certain other defendants charged with the appellant here with having committed the same offense, Judge Gillespie pointed out that the procedure which had taken place upon the arrest of the defendants therein named was exactly as he stated it should be. He said, furthermore, that the two warrants, that is Exhibit P-3 of September 21, 1944, and the one which was sent to New Jersey for the apprehension of Robichaud, were identical.

Finally, Judge Gillespie testified that if the appellant, Robichaud, were delivered over to the Michigan authorities he could not be placed on trial on the warrant which is at

issue in this case. All that could be done with him was to treat him as Judge Carr had treated some of the defendants named in the other warrant, viz., to grant him a preliminary examination unless waived, and if there appeared probable cause for believing that Robichaud had committed the offense named in the warrant to bind him over to answer such information as might be filed against him. He said the law is well settled in Michigan that no information can be filed against a defendant until he shall have had, or waived, a preliminary examination, following which he is placed on trial for the offense which is charged in the information filed by the prosecuting attorney.

Mr. Crowley, when examined, testified that he had listened to the testimony of Judge Gillespie, and questions put to him and his answers. Mr. Crowley stated that he concurred in each of the statements with one minor exception which really was an error due to misuse of a term by the examining counsel.

It would seem to be conclusively established by the testimony of these two members of the Bar of Michigan that there is no possible foundation for the conclusion of the Court below that the warrant is in effect an indictment under the law of Michigan.

Neither the respondents, nor the State of Michigan, which is the real respondent, saw fit to offer any proof to refute the testimony of the witnesses Gillespie and Crowley.

(e)

Analysis of Michigan Cases Relied on by Court Below

The precise point with which we are dealing has not been passed upon by the Courts of Michigan; however, there are a number of decisions by the courts of that state indicating that a magistrate's warrant is not the equivalent of an indictment. See the following:

Yarner v. *People*, 34 Mich. 286; *People* v. *Sessions*, 58 Mich. 594, 596; 26 N. W. 291 (Sup. Ct. 1886); *People* v. *Bechtel*, 80 Mich. 623, 632; 45 N. W. 582 (Sup. Ct. 1890). Also, it is not a pleadable charge. *People* v. *Pichette*, 111 Mich. 461; 69 N. W. 739 (Sup. Ct. 1897); *People* v. *Kohler*, 93 Mich. 625; 53 N. W. 826 (Sup. Ct. 1892); *Hawkins* v. *Ralston*, 69 Mich. 63; 37 N. W. 45 (Sup. Ct. 1888).

The New Jersey Supreme Court in its decision (49 A. 2d, p. 289) adverted to the case of *People* v. *Kert*, 304 Mich. 148, 7 N. W. (2d) 251, 255, as authority for the proposition that the warrant in this case is equivalent to an indictment. The Supreme Court quoted the following from the Michigan case (49 A. 2d 289):

> ". . . that the investigation was assigned to a judge who acted as a one man grand jury; that there is probable cause to suspect the conspiracy, etc. The grand jury warrant took the place of an indictment, which under the Code of Criminal Procedure, 3 Comp. Laws 1929, sec. 17118, Stat. Ann. sec. 28.843, includes the words information, presentment, complaint warrant and any other formal written accusation."

In order to determine exactly what the Michigan court meant when it used these words it is necessary to consider what was before the Court for decision. The statute referred to will be found in the first chapter of the Criminal Procedure Act which deals with definitions. It must of necessity be general in nature and certainly will be controlled by an expression of contrary intent. It seems clear upon a reading of the cases, a consideration of the statutes regulating the charging of a crime by means of information and the specific provisions of the Uniform Criminal Extradition Act concerning the documents on which extradition may be based, that the Michigan legislature meant to distinguish between terms such an indictment, warrant, information, etc. It will be observed that Chapter VII, Section 2, of the Code of Criminal Procedure distinguishes between

indictments, informations and pre-trial proceedings. Section 7 provides that no grand juries shall be drawn unless the Judge of a competent court shall so direct by writing and filing with the Clerk of the Court; Sections 1 and 2 as a practical matter provide for the substitution of an information for an indictment. However, the indictment process may still be used.

The *Kert* case is one of a series of Michigan cases which talks generally of a "one-man grand jury." The Court refers to *People* v. *St. John*, 284 Mich. 24 as substantiating its position that the grand jury warrant took the place of an indictment. That case does not so hold and it is interesting to note the use of the term "so-called grand jury proceeding" (p. 27), when the Court refers to the propriety of such proceedings. At page 27 the Court, referring to this procedure, said:

> "The power thus granted the examining magistrate is *analogous* to the power of the old grand jury to make independent inquiry into offenses as to which no formal bill of indictment had been filed by the prosecuting officer." (Italics ours.)

Although the appellant feels that the *Kert* case, as applied in the present situation, is miscited, he believes that it correctly states the Michigan law for the proposition it was fundamentally concerned with. The primary question before the Court was whether the crime of perjury could be committed in a hearing before a Judge who sat as a Magistrate and Conservator of the Peace under the Michigan statutes. The defendant claimed the Judge was not acting in a judicial capacity at such a hearing and the testimony was not given in a legal proceeding. The Court held it was such a judicial proceeding in which perjury could be committed. *People* v. *St. John, supra,* referred to by the Court in the *Kert* case as authority for its position, also deals with the question whether a witness before the so-called one-man grand jury could be guilty of perjury and an evenly divided Court held he could be.

Other cases referred to in the Supreme Court's opinion as substantiating the *Kert* case are *In re Watson*, 293 Mich. 263, 291 N. W. 652; *In re Petition for Investigation of Recount*, 270 Mich. 328, 258 N. W. 776; *People* v. *Ewald*, 302 Mich. 31, 4 N. W. (2d) 456. The *Watson* case deals chiefly with the privilege of immunity and the right of a witness before a one man grand jury proceeding to refuse to answer incriminating questions. From this case it appears that a party can be guilty of contempt in such a hearing. The last two cases mentioned are primarily concerned with the jurisdiction of the Recorder's Court of the City of Detroit and in the Petition for Recount the Court says the proceeding is in the nature of an inquest.

So it appears that the procedure adopted by the Michigan legislature for the prosecution of criminal offenders has lead to much loose use of language. This was recognized in *In re Slattery*, 310 Mich. 458, where the Court refers to it as a "so-called one-man grand jury" and says at page 461:

> "An examination by the circuit judge, under the statutes above cited (reference is to same statutes on which instant case is based), is similar to that of a grand jury. It is popularly known as a 'one-man grand jury' proceeding. Even though this term may be a misnomer, it nevertheless is descriptive and we refer to the examination as that of a 'one-man grand jury.'"

Conclusion

The contention of the Petitioner is that under the Federal Constitution, the Federal Statute, and the Uniform Extradition Act of Michigan, the demanding state, and New Jersey, the asylum state, the fundamental requirements upon which a request for extradition can be based and honored are:

(a) An affidavit before a Magistrate, or

(b) An indictment, or

(c) An information.

Such requirements must be strictly observed and complied with. When the basic of any request is any one of these the only question remaining is does such basis instrument or precept substantially charge a crime committed in the demanding state. In the present cause the record does not show an affidavit before a Magistrate, or an information as the basis of the demand. In fact, nowhere throughout the proceedings have these fundamental prerequisites been contended to exist by the respondents. The contention has been solely that the "warrant" is an indictment under the laws of Michigan. The appellant's contention is and always has been, that it is not an indictment but nothing more than an interlocutory process employed during the investigation, by the Circuit Court Judge, to bring before him the parties suspected of having committed a crime. It is but a step in the inquisition which may, or may not, eventuate in the filing of an information by the prosecuting attorney. It is not in purpose or language an instrument or writ charging a crime. Such an instrument or precept is an information filed or an indictment returned by a grand jury.

Here we have neither—information nor indictment.

Wherefore, petitioner respectfully prays that this petition for a writ of certiorari to review the decision of the Court of Errors and Appeals of the State of New Jersey should be granted.

Respectfully submitted,

THOMAS MCNULTY,
Counsel for Petitioner.

APPENDIX 1

OYER AND TERMINER

TERM, A. D. 19

County, to wit:—The Grand Inquest of the State of New Jersey, in and for the body of the County of , upon their respective oath

PRESENT, That

late of the of in the said County of , on the day of in the year of Our Lord one thousand nine hundred and with force and arms, at the aforesaid, in the County aforesaid, and within the jurisdiction of this Court,
with a certain

which , the said in hands then and there had and held, in and upon one in the peace of God and of this State then and there being, did commit an assault with an intent the said then and there to kill, contrary to the form of the Statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

And the Grand Inquest aforesaid, upon their oath aforesaid, do further

PRESENT, That the said

on the day of in the year

of our Lord one thousand nine hundred and

at the aforesaid, in the County of

aforesaid, and within the jurisdiction of this Court, in and upon one in the

peace of God and of this State, then and there being, an

assault did make, and , the said

then and there did beat, wound and

ill-treat and other wrongs, to the said

then and there did, to the great damage of the said

contrary to the form of the Statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

Prosecutor of the Pleas.

APPENDIX 2

ABSTRACT OF THE PERTINENT SECTIONS OF THE PUBLIC LAWS OF MICHIGAN

Section 17217 (Sec. 28.943 of Mich. Stat. Anno.):

"Whenever by *reason of the filing of any complaint,* which may be on information and belief, any justice of the peace, police judge or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney or city attorney, in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of the law about which he may be questioned;" etc.

Section 17218 (Sec. 28.944 Mich. Stat. Anno.):

"If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof he may cause the apprehension of such person or persons by proper process and, upon the return of such process served or executed, the justice or judge shall proceed with the case matter or proceeding in like manner *as upon formal complaint* * * * And in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney or other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors."

Section 17196:

"*Examination; time, manner.* Sec. 4. The Magistrate before whom any person is brought on a charge of having committed an offense not cognizable by a justice of the peace, shall set a day for examination not exceeding ten (10) days thereafter, at which time he shall examine the complaint and the witnesses in support of the prosecution on oath in the presence of the prisoner, in regard to the offense charged and in regard to any other matters connected with such charge which such Magistrate may deem pertinent."

Section 17205:

"*Discharge of defendant; binding defendant over for trial.* Sec. 13. If it shall appear to the Magistrate upon the examination of the whole matter, either that no offense has been committed or that there is not probable cause for charging the defendant therewith, he shall discharge such defendant. *If it shall appear to the Magistrate* upon the examination of the whole matter, that an offense not cognizable by a justice of the peace has been committed and *there is probable cause for charging the defendant therewith, said Magistrate shall forthwith bind such defendant to appear before the circuit court of such county or any court having jurisdiction of said cause, for trial.*"

Section 17207:

"*Certification, return of examination and recognizance to trial court.* Sec. 15. All examinations and recognizances taken by any magistrate pursuant to any of the provisions of this chapter, shall be forthwith certified and returned by him to the clerk of the court before which the party charged is bound to appear, and if such magistrate shall refuse or neglect to return the same, he may be compelled forthwith by rule of the court, and in case of disobedience he may be proceeded against by attachment as for a contempt."

Section 17254:

"*Information; filing, signature, endorsement of names of witnesses.* Sec. 40. All informations shall be filed during term in the court having jurisdiction of the offense specified therein, after the proper return is filed by the examining magistrate by the prosecuting attorney of the county as informant; he shall subscribe his name thereto, and indorse thereon the names of witnesses known to him at the time of filing the same. Names of other witnesses may be endorsed before or during the trial by leave of the court and upon such conditions as the court shall determine."

Section 17255:

"*Investigation by prosecutor; statement of reasons for failure to file information; order of court for filing.* Sec. 41. It shall be the duty of the prosecuting attorney of the proper county to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination as provided by law, touching the commission of any offense whereon the offender shall be committed to jail or become recognized or held to bail; and if the prosecuting attorney shall determine in any case that an information ought not to be filed, he shall make, subscribe and file with the clerk of the court a statement, in writing, containing his reasons in fact and in law, for not filing an information in such case and that such statement shall be filed at and during the term of the court at which the offender shall be held for appearance: *Provided*, That in such case such court may examine said statement, together with the evidence filed in the case and if, upon such examination, the court shall not be satisfied with said statement, the prosecuting attorney shall be directed by the court to file the proper information and bring the case to trial."

Section 17256:

"*Examination as condition precedent to filing of information; exception; demand for fugitive from justice.* Sec. 42. No information shall be filed

against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace or other examining magistrate or officer, unless such person shall waive his right to such examination: *Provided, however, that informations may be filed without such examination against fugitives from justice, and any fugitive from justice against whom an information shall be filed, may be demanded by the governor of this state of the executive authority of any other state or territory or of any foreign government, in the same manner and the same proceedings may be had thereon as provided by law in like cases of demand upon indictment filed.*"

APPENDIX 3

NEW JERSEY COURT OF ERRORS AND APPEALS

No. 14—February Term 1947

ARMAND ROCHIBAUD,

Appellant,

vs.

DANIEL J. BRENNAN, &c., *et al.*,

Respondents.

Argued Feb. 4, 1947—Decided

On appeal from Supreme Court, whose opinion is reported at 134 N. J. L. 532.

RICHARD J. FITZMAURICE (John Milton of Counsel) for the Appellant.

JEROME B. LITVAK, Special Deputy Atty Genl., for the Respondent (C. William Caruso, Special Asst. Prosecutor, of Counsel).

Per Curiam

The judgment under review herein is affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Donges in the Supreme Court.

"ENDORSED—Filed
Apr 24 1947
LLOYD B. MARSH
clerk"